

*696 36 S.Ct. 696

241 U.S. 591, 60 L.Ed. 1192

Supreme Court of the United States.

UNITED STATES, Plff. in Err.,

v.

FRED NICE.

No. 681.

Argued and submitted April 24, 1916.

Decided June 25, 1916.

IN ERROR to the District Court of the United States for the District of South Dakota to review a judgment sustaining a demurrer to and dismissing an indictment charging the unlawful sale of intoxicating liquors to an allottee within the state. Reversed.

The facts are stated in the opinion.

West Headnotes

Indians ⇨ 13(10)

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209k9 Lands

209k13 Allotment or Partition

209k13(10) Operation and Effect.

No intention to dissolve tribal relations and terminate national guardianship on making of allotments and issuing of trust patents without waiting for expiration of trust period is shown by Indian Allotment Act, §§ 5, 6, 24 Stat. 388, 25 U.S.C.A. §§ 348, 349.

Indians ⇨ 34

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209k34 Selling or Furnishing Liquors.

During the 25 years under which Indian allottees under Acts Feb. 8, 1887, 25 U.S.C.A. § 331 et seq., and March 2, 1889, 25 Stat. 888, remain tribal Indians under guardianship, the allotted lands are inalienable, Congress may, as is done by Act Jan. 30, 1897, 29 Stat. 506, 25 U.S.C.A. § 241, regulate or prohibit sale of intoxicating liquors to such Indians within a state.

[241 U.S. 592] Assistant Attorney General Warren for plaintiff in error.

[241 U.S. 594] Messrs. O. D. Olmstead, W. B. Backus, and W. J. Hooper for defendant in error.

[241 U.S. 595] Mr. Justice Van Devanter delivered the opinion of the court:

This is a prosecution for selling whisky and other intoxicating liquors to an Indian, in violation of the act of January 30, 1897 (chap. 109, 29 Stat. at L. 506, Comp. Stat. 1913, § 4137). According to the indictment, the sale was made August 9, 1914, in Tripp county, South Dakota; the Indian was a member of the Sioux Tribe, a ward of the United States, and under the charge of an Indian agent; and the United States was still holding in trust the title to land which had been allotted to him April 29, 1902. A demurrer was sustained and the indictment dismissed on the ground that the statute, in so far as it purports to embrace such a case, is invalid, because in excess of the power of Congress. The case is here on direct writ of error under the criminal appeals act (chap. 2564, 34 Stat. at L. 1246, Comp. Stat. 1913, § 1704).

By the act of 1897 the sale of intoxicating liquor to 'any Indian to whom allotment of land has been made while the title to the same shall be held in trust by *697 the government, or to any Indian a ward of the government under charge of any Indian superintendent or agent, or any Indian, including mixed bloods, over whom the government, through its departments, exercises guardianship,' is denounced as a punishable offense.

The allotment to this Indian was made from the tribal lands in the Rosebud Reservation, in South Dakota, under the act of March 2, 1889 (chap. 405, 25 Stat. at L. 888), the 11th section of which provided that each allotment should be evidenced by a patent, inaptly so called, declaring that for a period of twenty-five years--and for a further period if the President should so direct--the United States would hold the allotted land in trust for the sole use and benefit of the allottee, or, in case of his death, of his heirs, and at the end of that period would convey the [241 U.S. 596] same to him or his heirs in fee, discharged of the trust and free of all charge or encumbrance; that any lease or conveyance of the land, or contract touching the same, made during the trust period, should be null and void, and that each allottee should 'be entitled to all the rights and privileges and be subject to all the provisions' of § 6 of the general allotment act of February 8, 1887 (chap. 119, 24 Stat. at L. 388, Comp. Stat. 1913, § 4195). The act of 1889 recognized the existence of the tribe, as such, and plainly disclosed that the

tribal relation, although ultimately to be dissolved, was not to be terminated by the making or taking of allotments. In the acts of March 3, 1899 (chap. 450, 30 Stat. at L. 1362), and March 2, 1907 (chap. 2536, 34 Stat. at L. 1230), that relation was recognized as still continuing, and nothing is found elsewhere indicating that it was to terminate short of the expiration of the trust period.

By the general allotment act of 1887 provision was made for allotting lands in any tribal reservation in severalty to members of the tribe, for issuing to each allottee a trust patent similar to that just described and with a like restraint upon alienation, and for conveying the fee to the allottee or his heirs at the end of the trust period. Its 6th section, to which particular reference was made in § 11 of the act of 1889, declared that, upon the completion of the allotments and the patenting of the lands, the allottees should have 'the benefit of and be subject to the laws, both civil and criminal, of the state or territory' of their residence, and that all Indians born in the United States, who were recipients of allotments under 'this act, or under any law or treaty,' should be citizens of the United States, and entitled to all the rights, privileges, and immunities of such citizens. This act, like that of 1889, disclosed that the tribal relation, while ultimately to be broken up, was not to be dissolved by the making or taking of allotments, and subsequent legislation shows repeated instances in which the tribal relation of Indians [241 U.S. 597] having allotments under the act was recognized during the trust period as still continuing.

With this statement of the case, we come to the questions presented for decision, which are these: What was the status of this Indian at the time the whisky and other liquors are alleged to have been sold to him? And is it within the power of Congress to regulate or prohibit the sale of intoxicating liquor to Indians in his situation?

The power of Congress to regulate or prohibit traffic in intoxicating liquor with tribal Indians within a state, whether upon or off an Indian reservation, is well settled. It has long been exercised, and has repeatedly been sustained by this court. Its source is twofold; first, the clause in the Constitution expressly investing Congress with authority 'to regulate commerce . . . with the Indian tribes,' and, second, the dependent relation of such tribes to the United States. Of the first it was said in *United States v. Holliday*, 3 Wall. 407, 417-419, 18 L. ed. 182, 185, 186: 'Commerce with the Indian tribes means commerce with the individuals

composing those tribes. . . . The locality of the traffic can have nothing to do with the power. The right to exercise it in reference to any Indian tribe, or any person who is a member of such tribe, is absolute, without reference to the locality of the traffic, or the locality of the tribe, or of a member of the tribe with whom it is carried on. . . . This power residing in Congress, that body is necessarily supreme in its exercise.' And of the second it was said in *United States v. Kagama*, 118 U. S. 375, 383, 30 L. ed. 228, 231, 6 Sup. Ct. Rep. 1109: 'These Indian tribes are the wards of the nation. They are communities dependent on the United States. . . . From their very weakness and helplessness, so largely due to the course of dealing of the Federal government with them and the treaties in which it has been promised, there arises the duty of protection, and, with it, the power.' [241 U.S. 598] What was said in these cases has been repeated and applied in many others. (FN1)

Of course, when the Indians are prepared *698 to exercise the privileges and bear the burdens of one *sui juris*, the tribal relation may be dissolved and the national guardianship brought to an end; but it rests with Congress to determine when and how this shall be done, and whether the emancipation shall at first be complete or only partial. Citizenship is not incompatible with tribal existence or continued guardianship, and so may be conferred without completely emancipating the Indians, or placing them beyond the reach of congressional regulations adopted for their protection. (FN2) Thus, in *United States v. Holliday*, a prosecution for selling spirituous liquor to a tribal Indian in Michigan when not on a reservation, the contention that he had become a citizen was dismissed as 'immaterial;' in *Hallowell v. United States*, a prosecution for taking whisky upon an allotment held by a tribal Indian in Nebraska, the fact that he had been made a citizen was held not to take the case out of the congressional power or regulation; and in *United States v. Sandoval*, a prosecution for introducing intoxicating liquors into an Indian pueblo in New Mexico, it was held that whether the Indians [241 U.S. 599] of the pueblo were citizens need not be considered, because that would not take from Congress the power to prohibit the introduction of such liquors among them.

The ultimate question, then, is whether § 6 of the act of 1887--the section as originally enacted--was intended to dissolve the tribal relation and terminate the national guardianship upon the making of the allotments and the issue of the trust patents, without waiting for the expiration of the trust period.

According to a familiar rule, legislation affecting the Indians is to be construed in their interest, and a purpose to make a radical departure is not lightly to be inferred. Upon examining the whole act, as must be done, it seems certain that the dissolution of the tribal relation was in contemplation; but that this was not to occur when the allotments were completed and the trust patents issued is made very plain. To illustrate: Section 5 expressly authorizes negotiations with the tribe, either before or after the allotments are completed, for the purchase of so much of the surplus lands 'as such tribe shall, from time to time, consent to sell;' directs that the purchase money be held in the Treasury 'for the sole use of the tribe;' and requires that the same, with the interest thereon, 'shall be at all times subject to appropriation by Congress for the education and civilization of such tribe . . . or the members thereof.' This provision for holding and using these proceeds, like that withholding the title to the allotted lands for twenty-five years, and rendering them inalienable during that period, makes strongly against the claim that the national guardianship was to be presently terminated. The two together show that the government was retaining control of the property of these Indians, and the one relating to the use by Congress of their moneys in their 'education and civilization' implies the retention of a control reaching far beyond their property.

As pointing to a different intention, reliance is had [241 U.S. 600] upon the provision that when the allotments are completed and the trust patents issued the allottees 'shall have the benefit of and be subject to the laws, both civil and criminal, of the state' of their residence. But what laws was this provision intended to embrace? Was it all the laws of the state, or only such as could be applied to tribal Indians consistently with the Constitution and the legislation of Congress? The words, although general, must be read in the light of the act as a whole, and with due regard to the situation in which they were to be applied. That they were to be taken with some implied limitations, and not literally, is obvious. The act made each allottee incapable during the trust period of making any lease or conveyance of the allotted land, *699, or any contract touching the same, and, of course, there was no intention that this should be affected by the laws of the state. The act also disclosed in an unmistakable way that the education and civilization of the allottees and their children were to be under the direction of Congress, and plainly the laws of the state were not to have any bearing upon the execution of any direction Congress might give in this matter. The Constitution invested Congress

with power to regulate traffic in intoxicating liquors with the Indian tribes, meaning with the individuals composing them. That was a continuing power of which Congress could not divest itself. It could be exerted at any time and in various forms during the continuance of the tribal relation, and clearly there was no purpose to lay any obstacle in the way of enforcing the existing congressional regulations upon this subject, or of adopting and enforcing new ones, if deemed advisable.

The act of 1887 came under consideration in *United States v. Rickert*, 188 U. S. 432, 47 L. ed. 532, 23 Sup. Ct. Rep. 478, a case involving the power of the state of South Dakota to tax allottees under that act, according to the laws of the state, upon their allotments, the permanent improvements thereon, and the [241 U.S. 601] horses, cattle, and other personal property issued to them by the United States and used on their allotments, and this court, after reviewing the provisions of the act, and saying: 'These Indians are yet wards of the nation, in a condition of pupillage or dependency, and have not been discharged from that condition,' held that the state was without power to tax the lands and other property, because the same were being held and used in carrying out a policy of the government in respect of its dependent wards, and that the United States had such an interest in the controversy as entitled it to maintain a bill to restrain the collection of the taxes.

In addition to the fact that both acts--the general one of 1887 and the special one of 1889--disclose that the tribal relation and the wardship of the Indians were not to be disturbed by the allotments and trust patents, we find that both Congress and the administrative officers of the government have proceeded upon that theory. This is shown in a long series of appropriation and other acts, and in the annual reports of the Indian Office.

As, therefore, these allottees remain tribal Indians and under national guardianship, the power of Congress to regulate or prohibit the sale of intoxicating liquor to them, as is done by the act of 1897, is not debatable.

We recognize that a different construction was placed upon § 6 of the act of 1887 in *Re Heff*, 197 U. S. 488, 49 L. ed. 848, 25 Sup. Ct. Rep. 506, but, after re-examining the question in the light of other provisions in the act, and of many later enactments, clearly reflecting what was intended by Congress, we are constrained to hold that the decision in that case is not well grounded, and it is

accordingly overruled.

Judgment reversed.

(FN1) United States v. Forty-three Gallons of Whiskey (United States v. Lariviere) 93 U. S. 188, 23 L. ed. 846; Dick v. United States, 208 U. S. 340, 52 L. ed. 520, 28 Sup. Ct. Rep. 399; United States v. Sutton, 215 U. S. 291, 54 L. ed. 200, 30 Sup. Ct. Rep. 116; Hallowell v. United States, 221 U. S. 317, 55 L. ed. 750, 31 Sup. Ct. Rep. 587; Ex parte Webb, 225 U. S. 663, 56 L. ed. 1248, 32 Sup. Ct. Rep. 769; United States v. Wright, 229 U. S. 226, 57 L. ed. 1160, 33 Sup. Ct. Rep. 630; United States v. Sandoval, 231 U. S. 28, 58 L. ed. 107, 34 Sup. Ct. Rep. 1; United States v. Pelican, 232 U. S. 442, 58 L. ed. 676, 34 Sup. Ct. Rep. 396; Perrin v. United States, 232 U. S. 478, 58 L. ed. 691, 34 Sup. Ct. Rep. 387; Johnson v. Gearlds, 234 U. S. 422, 58 L. ed. 1383, 34 Sup. Ct. Rep.

794; Joplin Mercantile Co. v. United States, 236 U. S. 531, 545, 59 L. ed. 705, 711, 35 Sup. Ct. Rep. 291.

(FN2) United States v. Holliday, 3 Wall. 407, 18 L. ed. 182; Cherokee Nation v. Hitchcock, 187 U. S. 294, 308, 47 L. ed. 183, 188, 23 Sup. Ct. Rep. 115; United States v. Rickert, 188 U. S. 432, 445, 57 L. ed. 532, 539, 23 Sup. Ct. Rep. 478; United States v. Celestine, 215 U. S. 278, 54 L. ed. 195, 30 Sup. Ct. Rep. 93; Marchie Tiger v. Western Invest. Co. 221 U. S. 286, 311-316, 55 L. ed. 738, 747-749, 31 Sup. Ct. Rep. 578; Hallowell v. United States, 221 U. S. 317, 324, 55 L. ed. 750, 753, 31 Sup. Ct. Rep. 587; United States v. Sandoval, 231 U. S. 28, 48, 58 L. ed. 107, 114, 34 Sup. Ct. Rep. 1; Eells v. Ross, 12 C. C. A. 205, 29 U. S. App. 59, 64 Fed. 417; Farrell v. United States, 49 C. C. A. 183, 110 Fed. 942; Mulligan v. United States, 56 C. C. A. 50, 120 Fed. 98.